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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/709,758	05/26/2004	Mark Padilla	3066-03	3757
37101	7590	07/25/2005	EXAMINER	
LAW OFFICE OF MICHAEL P. EDDY 12526 HIGH BLUFF DRIVE, STE. 300 SAN DIEGO, CA 92130			CONLEY, SEAN EVERETT	
			ART UNIT	PAPER NUMBER
			1744	

DATE MAILED: 07/25/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)
	10/709,758	PADILLA, MARK
	Examiner	Art Unit
	Sean E. Conley	1744

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 26 May 2004.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-12 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 26 May 2004 is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
Paper No(s)/Mail Date _____	6) <input type="checkbox"/> Other: _____

DETAILED ACTION

Drawings

1. The drawings are objected to because they are hand drawn sketches with hand written labels. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Objections

2. Claim 1 is objected to because of the following informalities: The word "anda" should be "and a". Appropriate correction is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 2 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 2 recites the limitation "the housing". There is insufficient antecedent basis for this limitation in the claim.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1-5, 9 and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Shinichi (JP 10008775 A).

Regarding claim 1, Shinichi discloses a combination candle and incense holder comprising; a vertically disposed base (board (1)) having an inner surface (1a) that is configured to be capable of accommodating a candle (F1) from the top portion of said base and that is configured to be capable of accommodating a receptacle (12) through an aperture (13) in said base; and a removable receptacle (12) disposed in said aperture (13) on a wall of said base that is capable of receiving an ignitable fragrant

solid (F2) or an ignitable fragrant oil (see figure; paragraph [0009] of the English translation).

Regarding claim 2, Shinichi discloses a receptacle (12) mounted on a top portion of the base (1) that is capable of receiving an ignitable fragrant solid (F2) or an ignitable fragrant oil (see figure 1).

Regarding claim 3, Shinichi discloses an air well (10) disposed in said base for passage and escape of air from said receptacle (12) (see figure 1).

Regarding claim 4, Shinichi discloses a receptacle (12) that is bowl shaped (see figures 1 and 2).

Regarding claim 5, Shinichi discloses a base that has a square shape (see figures).

Regarding claim 9, Shinichi discloses that the incense (F2) accommodated in said incense holder (receptacle (12)) has a stick shape (see figure 1 and 4; paragraph [0008] of the English translation).

Regarding claim 11, Shinichi discloses a receptacle that is integral to the base (see figure 1).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shinichi as applied to claim 1 above, and further in view of Evans (U.S. Patent No. 1,665,659).

Shinichi fails to teach a receptacle comprising a handle. Evans discloses an incense burner that comprises a handle (13) attached to the incense holding receptacle (9). The handle facilitates movement of the device. This reference has been relied upon to teach that it is known to attach a handle to a receptacle holding incense. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Shinichi and incorporate a handle with receptacle (12) so that the receptacle can be easily moved or transported as taught by Evans.

5. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shinichi as applied to claim 1 above, and further in view of Radkins et al. (U.S. Patent No. 4,347,217).

Shinichi fails to teach incense that is cone-shaped. Radkins et al. discloses an incense holder that holds either an incense stick or an incense that is cone-shaped (see

figures 1 and 6; col. 4, lines 4-19). This reference has been relied upon to teach that it is known to interchangeably use incense that is cone shaped or in the shape of a stick in order to dispense a fragrance.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Shinichi and replace the incense sticks with a functionally equivalent cone-shaped incense as taught by Radkins et al. in order to deodorize the surrounding air.

6. Claims 6-8 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shinichi as applied to claim 1 above.

Shinichi fails to specifically teach the various shapes for the base and the incense as claimed by the applicant. However, it would have been an obvious matter of design choice to make the base square, cylindrical, a cone, or a star and also make the incense a stick or a cone shape since such a modification would have involved a mere change in the shape and the applicant has not provided persuasive evidence that a particular shape performs a significant advantage over other shapes. A change in shape is generally recognized as being within the level of ordinary skill in the art. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966) (The court held that the configuration of the claimed disposable plastic nursing container was a matter of choice which a person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the claimed container was significant.).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sean E. Conley whose telephone number is 571-272-8414. The examiner can normally be reached on M-F 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Kim can be reached on 571-272-1142. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

July 21, 2005
SEC

S.E.C.

John Kim
JOHN KIM
SUPERVISORY PATENT EXAMINER